Unijaya Teknologi Sdn Bhd v Syarikat Elektrik RBA Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–980 OF 2008
JOHN LOUIS O'HARA J
25 JANUARY 2012

Civil Procedure — Appeal — Appeal against decision of senior assistant registrar — Application for extension of time to file application to set aside judgment in default — Application made by party not named as defendant — Whether application defective — SAR disallowed withdrawal and dismissed application — Whether SAR had discretion to disallow

The first defendant had issued cheques for payment of works completed by the plaintiff pursuant to a contract entered between the parties. However, the plaintiff could not get the payment as the first defendant's bank account was frozen. Aggrieved, the plaintiff claimed for the payment against the first defendant and its directors (the second and third defendants), who were signatories for the cheques. The first and second defendants failed to file their defence, causing the plaintiff to enter judgment in default against them for the sum of RM789,415.95 ('the judgment sum'). A 'fourth defendant' filed for an extension of time ('encl 31') for the second and third defendants to file an application to set aside the judgment in default. When the defendants attempted to withdraw encl 31 through an oral application, the senior assistant registrar ('SAR') disallowed it and seeing that the fourth defendant was never cited as a defendant in the plaintiff's claim, the SAR further dismissed encl 31 with costs. In the present application ('encl 43'), the defendants appealed against the decision of the SAR in disallowing their oral application to withdraw encl 31.

Held, dismissing the application with costs fixed at RM5,000:

(1) The SAR had before her, the defendant's plainly and clearly defective application. The SAR had the discretion to allow or to disallow it. She had correctly applied her mind to the materials before her and having regard to the situation that had arisen, the SAR did not err when she exercised her discretion to disallow the defendant's application to withdraw encl 31. There was no reason by the court to disturb the discretion exercised by the SAR (see paras 17 & 19).

(2) Upon rehearing of encl 31 as well as the defendants' oral application to withdraw encl 31, this was a proper case for the court to exercise its

discretion to refuse the defendants' oral application to withdraw encl 31. The decision of the SAR was upheld and affirmed (see para 23).

(3) The court ordered the defendants' counsel/solicitor to pay the costs of encl 43 to the plaintiff. Having considered the history of the matter and the numerous mistakes and defects, it would not be fair to penalise the defendants in regard to costs awarded to the plaintiff. The defendants were entitled to expect a high degree of competency from their advocate and solicitor and should not be burdened with payment of costs for his shortcomings (see para 24).

[Bahasa Malaysia summary

Defendan pertama telah mengeluarkan cek-cek untuk pembayaran kerja yang siap oleh plaintif berikutan kontrak yang ditandatangani di antara mereka. Plaintif walau bagaimanapun tidak menerima pembayaran tersebut kerana akaun bank defendan pertama dibekukan. Tidak puas hati, plaintif menuntut bayaran terhadap defendan pertama dan pengarah-pengarahnya (defendan kedua dan ketiga), penandatangan-penandatangan untuk cek-cek tersebut. Defendan pertama dan kedua gagal untuk memfailkan pembelaan mereka, menyebabkan plaintif memasukkan penghakiman ingkar terhadap mereka untuk wang sejumlah RM789,415.95 ('jumlah penghakiman). 'Defendan keempat' memfailkan permohonan untuk pelanjutan masa ('lampiran 31') untuk defendan kedua dan ketiga memfailkan permohonan untuk mengetepikan penghakiman ingkar. Apabila defendan-defendan mencuba untuk menarik balik lampiran 31 melalaui permohonan lisan, timbalan pendaftar kanan ('TPK') tidak membenarkannya dan melihat yang defendan keempat tidak dirujuk sebagai defendan di dalam tuntutan plaintif, TPK selanjutnya menolak lampiran 31 dengan kos. Dalam permohonan ini ('lampiran 43'), defendan-defendan merayu terhadap keputusan TPK dalam menolak permohonan lisan mereka untuk menarik balik lampiran 31.

Diputuskan, menolak permohonan dengan kos ditetapkan RM5,000:

(1) Permohonan defendan yang jelas cacat berbangkit di hadapan TPK. TPK mempunyai budi bicara untuk membenarkan atau tidak membenarkannya. Beliau telah secara betul mengarahkan mindanya kepada material di hadapannya dan mengambil kira kepada keadaan yang berbangkit, TPK tidak tersilap apabila beliau melaksanakan budi bicaranya untuk tidak membenarkan permohonan defendan untuk menarik balik lampiran 31. Tidak terdapat alasan untuk mahkamah campur tangan budi bicara yang dilaksanakan oleh TPK (lihat perenggan 17 & 19).

(2) Selepas pendengaran semula lampiran 31 dan juga permohonan lisan defendan-defendan untuk menarik balik lampiran 31, ini adalah kes betul untuk mahkamah melaksanakan budi bicaranya untuk menolak

permohonan lisan defendan untuk menarik balik lampiran 31. Keputusan TPK disahkan (lihat perengggan 23).

(3) Mahkamah memerintahkan peguam defendan-defendan membayar kos lampiran 43 kepada plaintif. Setelah mengambil kira sejarah perkara tersebut dan kesilapan dan kecacatan yang banyak sekali, adalah tidak adil untuk menghukum defendan-defendan berkaitan kos yang diawardkan kepada plaintif. Defendan-defendan berhak untuk menjangkakan tahap kecekapan daripada peguambela dan peguamcara mereka dan tidak patut dibebankan dengan bayaran kos untuk kelemahannya (lihat perenggan 24).]

Notes

For cases on appeal against decision of senior assistant registrar, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 785–791.

Cases referred to

Civil Service Co-operative Society Ltd, The v General Steam Navigation Co Ltd, The [1903] 2 KB 756, CA (refd)

Donald Campbell & Co, Ltd v Pollak [1927] AC 732, HL (refd)

Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46, CA (refd)

Maxwell v Keun & Ors, Same v Same [1928] 1 KB 645, CA (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97, SC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram [2009] 2 MLJ 473, FC (refd)

Legislation referred to

Rules of Court 2012 O 21 r 6

Justin Woon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the plaintiff. Jagesh M Lingam (Mathews Hun Lachimanan) for the defendants.

John Louis O'hara J:

INTRODUCTION

[1] This matter came before me as the hearing of, inter alia, encl 43.

[2] Enclosure 43 states that:

A … Defendan Kedua dan Ketiga yang dinamakan di atas bercadang hendak merayu terhadap keputusan Penolong Kanan pendaftar Puan Vanita a/p Vasudevan, yang diberikan pada 7 haribulan September, 2011 yang menolak permohonan asal Defendan Kedua dan Ketiga untuk menarik balik Lampiran 31 dan memerintahkan bahawa permohonan Defendan Kedua dan Ketiga yang terkandung dalam Saman Dalam Kamar (Lampiran 31) bertarikh 29 haribujan April, 2011 ditolak dengan kos.

[3] Enclosure 31 states that it is the 'fourth defendant's' application to the senior assistant registrar ('SAR') which seeks:

(1) Bahawa Defendan Kedua dan Ketiga diberi perlanjutan masa untuk memfailkan satu permohonan mengenepikan Penghakiman Ingkar Pembelaan bertarikh 3/2/2009 dalam tempoh tiga puluh (30) hari dari tarikh penyerahan perintah bermeterai ini;

(2) Bahawa Defendan kedua dan ketiga boleh menyampaikan kepada Plaintif satu salinan Saman Dalam Kamar untuk mengenepikan penghakiman Ingkar Pembelaan tidak lebih dari tujuh (7) hari sebelum tarikh yang ditetapkan untuk pendengaran permohonan ini;

(3) Kos tindakan ini dijadikan kos dalam kausa; dan

(4) Lain-lain perintah dan/atau arahan selanjutnya yang Mahkamah yang Mulia ini fikirkan patut dan munasabah.

[4] The plaintiff in their writ and statement of claim had cited the defendants as follows:

(1) Syarikat Elektrik RBA Sdn Bhd;

(2) Rahman bin Ayob;

(3) Yahaya bin Ayob.

[5] According to the file there is and never has been a 'fourth defendant' in this matter. As such encl 31 is prima facie defective.

[6] In the hearing of an appeal of this nature from the decision of a SAR to a judge in chambers, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the SAR are by way of an actual re hearing and the judge treats the matter as though it comes before him for the first time. Per Edgar Joseph FCJ in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36 and *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 106.

[7] Having heard the oral submissions and in rehearing encl 31, it was my

decision that there was no merit in encl 31. I therefore ruled in favour of the plaintiff and affirmed the decision of the SAR in regard to encl 31. In doing so I therefore dismissed encl 43 with costs.

[8] The second and third defendants now appeal against my decision vide a notice of appeal which reads as follows:

> SILA AMBIL PERHATIAN bahawa Rahman bin Ayob dan Yahaya bin Ayob, iaitu Perayu-Perayu yang dinamakan di atas, yang tidak berpuas hati dengan keseluruhan keputusan Yang Arif. Hakim John Louis O'Hara yang diberikan di Mahkamah Tmggi Kuala Lumpur pada 27.10.2011 merayu kepada Mahkamah Rayuan Malaysia terhadap keseluruhan keputusan tersebut yang:
>
> 1 telah menolak Notis Rayuan Perayu-Perayu untuk satu permohonan bagi perlanjutan masa untuk mengenepikan Penghakiman Ingkar Pembelaan bertarikh 3.2.2009; dan
>
> 2 telah menolak permohonan Perayu-Perayu yang berkaitan dengan Notis Rayuan yang dinyatakan dalam perenggan 1 diatas.

THE FACTUAL MATRIX

[9] The plaintiff is claiming for the payment of the works done pursuant to a contract entered between plaintiff and the first defendant, whereby the second and third defendants were the directors in the first defendant. The first defendant issued cheques for the payment claimed but the bank account was frozen and the plaintiff could not get the monies.

[10] The second and third defendants were the signatories for the cheques, hence are sued for the same liability as the first defendant but on a personal basis.

[11] In default of the first to second defendants' filing their defence, the plaintiff entered judgment in default against them on 3 February 2009 for the sum of RM789,415.97 ('the judgment sum'). By this judgment in default, the plaintiff proceeded with serving a bankruptcy notice ('BN') dated 8 March 2011 on them by registered post dated 5 April 2011.

[12] The 'fourth defendant' filed encl 31 on 29 April 2011 for an extension of time for the second and third defendants to file an application to set aside the judgment in default.

THE REASONS FOR MY DECISION

[13] Enclosure 31 was heard by the SAR on 17 August 2011. A perusal of her handwritten notes of evidence discloses that the defendant's counsel had begun

by submitting in support of encl 31. The plaintiff's counsel responded after which the defendants' counsel in his reply/rebuttal had stated and the SAR had recorded as follows:

> Defendant's Reply -
>
> - do admit discrepancy in affidavit … not defendant,
>
> - does not prejudice … who are the people who are prejudice here,
>
> - Kami pohon withdraw this application and to file afresh,
>
> - issue on prejudice - can be rectified
>
> -this application to withdrawn
>
> -we are not lying,
>
> - judgment obtained on 2010,
>
> - never given chance to be filed,
>
> - interest of justice - allow to withdraw to file afresh with amendment,
>
> - JID only procedural defect,
>
> - natural justice come in - right to trial.

[14] The plaintiff's counsel objected to the defendant's oral application to withdraw encl 31. He cited O 21 r 6 which states that a party who has taken out a summons in a cause or matter may not withdraw it without the leave of court. He argued that there would be prejudice to the plaintiff and that it was clear that the defendant's oral application to withdraw was an afterthought that only crystallised after the defendant's counsel had heard the plaintiff's counsel's submission in reply opposing encl 31.

[15] The SAR then reserved her decision which she delivered on 7 September 2011. In exercise of her discretion she dismissed encl 31 with costs of RM1,000, thereby disallowing the defendants' application to withdraw encl 31.

[16] That the SAR exercised her discretion and refused the defendants' oral application to withdraw encl 31, is obvious and indisputable. The question arises as to whether she had exercised her discretion judiciously. See *Maxwell v Keun & Ors, Same v Same* [1928] 1 KB 645, *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46, and *Vijayalakshmi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram* [2009] MLJU 103, wherein Zaki Tun Azmi CJ referred to *Donald Campbell & Co, Ltd v Pollak* [1927] AC 732 wherein Lord Blanesburgh quoted the words of Lord Halsbury LC in *Civil Service Co-operative Society Ltd v General Steam Navigation Co Ltd* [1903] 2 KB 756:

no doubt where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied …

[17] Here the SAR had before her the defendant's plainly and clearly defective affidavit. She had heard submissions from the defendants' counsel which were replied to by the plaintiff's counsel. It was then and only then in his reply/rebuttal that the defendant's counsel applied orally to withdraw his encl 31. The SAR had a discretion to allow or to disallow. I am satisfied that she had correctly applied her mind to the materials before her (including the submissions) and having regard to the situation that had arisen she did not err when she exercised her discretion to disallow the defendants' oral application to withdraw encl 31.

[18] In spite of encl 31 being dismissed (not struck out) the 'fourth defendant' (again) filed encl 38 on 12 September 2011 for the following orders:

1 Bahawa Defendan kedua dan ketiga diberi perlanjutan masa untuk menegepikan penghakiman Ingkar Pembelaan bertarikh 3/2/2009;

2 Bahawa Penghakiman Ingkar bertarikh 3/2/2009 diketepikan atas sebab terdapat isu-isu yang bermerit yang ketara yang harus dibicarakan;

3 Defendan Kedua dan Ketiga dibenarkan untuk memfailkan Pembelannya di luar tempoh masa dan menyempurnakan kepada Plaintif dalam masa empat belas hari dari perintah ini;

4 Kos tindakan ini dijadikan kos dalam kausa; dan

5 Lain-lain perintah dan/atau arahan selanjutnya yang Mahkamah yang Mulia ini fikirkan patut dan munasabah.

The filing of encl 38 is to my mind a clear abuse of process, since there is no 'fourth defendant' on record, and res judicata applies.

[19] The defendants then filed their notice of appeal, encl 43, against the decision of the SAR on 12 September 2011. I can see no reason for me to disturb the discretion exercised by the SAR to refuse the defendants' oral application to withdraw encl 31.

[20] Now coming back to encl 31, the 'fourth defendant' states that the 'Alasan-alasan bagi menyokong permohonan ini adalah seperti berikut':

1 Defendan Keempat tidak pernah menerima sesalinan Writ Saman bertarikh 11/8/2009 kerana ianya dialamatkan ke alamat Defendan Pertama di Johor sedangkan Defendan Keempat kini tinggal di Selangor;

2 Defendan Keempat bukan lagi seorang pengarah di Syarikat Defendan Pertama dan telah berhenti sejak tahun 2004;

3 Defendan-Defendan Pertama, Kedua, Ketiga dan Kelima tidak memaklumkan kepada Defendan Keempat mengenai Writ Saman tersebut walaupun tahu dan mempunyai alamat tempat tinggal Defendan Keempat yang baru;

4 Defendan Keempat tidak pernah menandatangani Perjanjian Continuing Guarantee bertarikh 1/7/2003 seperti yang didakwa oleh Plaintif kerana Defendan Keempat telah berhenti dari Syarikat Defendan Pertama mulai 1/6/2003.

But there is no such entity as 'fourth defendant' on record.

[21] Enclosure 31A is the affidavit in support of encl 31. Enclosure 31A is clearly defective in that it purports to be the affidavit of Rahman bin Ayob (No K/P 520302-04-5677). Yet it is stated to be that of the third defendant and is in fact affirmed by the third defendant, Yahaya bin Ayob.

[22] It is clear to me that:

(a) encl 31 was filed by the 'fourth defendant' who is non existent;

(b) the alasan given to support the filing of encl 31 is clearly irrelevant, extraneous, immaterial and unrelated;

(c) encl 31A, the affidavit in support is plainly and obviously defective and cannot and does not lend support to encl 31; and

(d) encl 31 is therefore rendered unsustainable.

CONCLUSION

[23] Based upon the above reasoning, it is my conclusion that upon a rehearing of encl 31 as well as the defendants' oral application to withdraw encl 31, this was a proper case for the court to exercise its discretion to refuse the defendants' oral application to withdraw its encl 31. Furthermore the SAR had correctly dismissed encl 31 in view of the affidavit in support thereof being defective.

[24] I therefore uphold and affirm the decision of the SAR made in regard to encl 31 and in doing so I dismiss encl 43 with costs which I fix at RM5,000, to be paid by Mr Jagesh the defendants' counsel/solicitor to the plaintiff. I made this order because having considered the history of the matter and the numerous mistakes and defects and the numerous summons in chambers filed it was my decision that it would not be fair to penalise the defendants in regard

to costs which I had awarded to the plaintiff. The defendants are entitled to expect a high degree of competency from their advocate and solicitor and should not be burdened with payment of costs for his short comings.

ORDER

[25] So ordered accordingly.

Application dismissed with costs fixed at RM5,000.

Reported by Afiq Mohamad Noor